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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

RUTH McCLAMMA STUEVE, Individually and as Trustee, etc., et al.,

Plaintiffs and Appellants,

v.

BERGER KAHN, a Law Corporation,

Defendant and Respondent.

G052689

(Super. Ct. No. 30-2010-00411651)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Robert J. Moss, Judge. Appeal dismissed.

Barnes Law, Robert E. Barnes and Keobopha Keopong, for Plaintiffs and Appellants.

Gipson Hoffman & Pancione and Allen L. Michel, for Defendant and Respondent.

* * *

In a civil case, a party can appeal a monetary sanction prior to the final judgment, but only if the amount exceeds $5,000. (Code Civ. Proc., § 904.1, subd. (a)(12).)[1] Here, the trial court ordered one of the parties to pay three individual discovery sanctions. They have appealed from that order. The total amount of the sanctions was $7,335, but none of the individual sanctions exceeded the $5,000 threshold. Thus, we must dismiss this interlocutory appeal for want of jurisdiction.

I

FACTUAL AND PROCEDURAL BACKGROUND

The plaintiffs in this lawsuit are the "heirs" (in lay terms) to the Alta Dena Dairy fortune built by the Stueve family (the Stueves). The defendant is Berger Kahn, a law firm. The underlying causes of action generally include various allegations of fraud, as well as claims of negligent hiring and supervision.

On February 18, 2015, Berger Khan propounded on the Stueves: a Request for Production of Documents ("RFPs"); Special Interrogatories ("SROGs"); and a Request for Admissions ("RFAs") with related Form Interrogatories ("FROGs"). The Stueves responded to the three discovery requests and the parties later exchanged several "meet and confer" letters.

On June 22, Berger Khan filed a motion to compel the Stueves to provide further responses to the RFPs with a $2,835 sanction request. Berger Khan filed a second motion to compel the Stueves to provide further responses to the RFAs and FROGs with a $1,800 sanction request. Berger Khan filed a third motion to compel the Stueves to provide further responses to the SROGs with a $2,700 sanction request.

On July 14, the Stueves filed an opposition to each of Berger Khan's three motions to compel. Berger Khan later filed a reply to each of the three oppositions.

[1] Further undesignated statutory references are to the Code of Civil Procedure.

On July 28, there was a telephonic hearing on the motions before a discovery referee. The following day, the discovery referee signed the last page of a document captioned: "ELEVENTH RECOMMENDATION OF THE DISCOVERY REFEREE; AND [PROPOSED] ORDER." (Original bolding omitted.) The document analyzed each of the three motions to compel under three separate headings. The recommendation granted the motion to compel further responses to the RFPs and awarded a $2,835 sanction. The recommendation granted the motion to compel further responses to the RFAs and FROGs and awarded a $1,800 sanction. The recommendation granted the motion to compel further responses to the SROGs and awarded a $2,700 sanction. Each sanction was apportioned against the Stueves and their attorney jointly and severally.

On August 6, the trial court signed the last page of the order, which was identical to the document the referee had signed, except it was now captioned: "ELEVENTH RECOMMENDATION OF THE DISCOVERY REFEREE; AND ORDER." (Original bolding omitted.)

On October 5, 2015, the Stueves filed a notice of appeal from the order of sanctions. Berger Khan later filed a motion to dismiss the appeal. The Stueves filed an opposition to the motion to dismiss.[2]

[2]The Stueves cited and relied on unpublished opinions in their opposition. (See Cal. Rules of Court, rule 8.1115(a).) The Stueves further requested that we take judicial notice of the unpublished opinions. (Evid. Code, § 452, subd. (d)(1).) We deny that request. The Stueves also attached to their opposition declarations that purport to narrate oral proceedings. (See Cal. Rules of Court, rule 8.120(b) [the record of oral proceedings must be in the form of a reporter's transcript, or an agreed or settled statement].) The Stueves are cautioned that this court has the authority to impose sanctions for violations of the appellate rules. (See also Cal. Rules of Court, rule 8.276(a)(4).)

II

DISCUSSION

Generally, an appellate court has no jurisdiction to consider the merits of a nonappealable judgment. (*Sheet Metal Workers Internat. Assn., Local Union No. 104 v. Rea* (2007) 153 Cal.App.4th 1071, 1074, fn. 2.) "An appeal, other than in a limited civil case, may be taken from any of the following: [] From an *interlocutory judgment* directing payment of monetary sanctions by a party or an attorney for a party if the amount exceeds five thousand dollars ($5,000)." (§ 904.1, subd. (a)(11), italics added.) The term "interlocutory judgment" ordinarily includes any order that is not a final judgment. (7 Witkin, Cal. Procedure (5th ed. 2008) Judgment, § 12, p. 556.)

In this case, the trial court directed the Stueves to pay three discovery sanctions ($2,835, $1,800, and $2,700). Because none of the pretrial sanctions exceeded the $5,000 appealability threshold, this court lacks jurisdiction to proceed on this appeal.

Recognizing this procedural roadblock, the Stueves contend: 1) the court actually ordered a single $7,335 sanction; 2) alternatively, this court should aggregate the three sanction amounts to meet the $5,000 threshold; or 3) this court should treat the appeal as an extraordinary writ. We will address each contention in turn.

A. The Trial Court Imposed Three Separate Monetary Sanctions

"[T]he court shall impose a monetary sanction . . . against any party, person, or attorney who unsuccessfully makes or opposes a motion to compel further response to a [discovery] demand . . . ." (§ 2031.310, subd. (h).) "An interlocutory judgment or order is a provisional determination of some or all issues in the cause." (7 Witkin, Cal. Procedure, *supra*, Judgment, § 12, p. 555.) "There is no prescribed form for a judgment. Its sufficiency depends on whether it shows distinctly that the issues have been adjudicated." (7 Witkin, Cal. Procedure, *supra*, Judgment, § 29, pp. 569-570;

see also *Berris & Seaton v. Meyers* (1984) 163 Cal.App.3d Supp. 54, 60 ["[i]t is well settled that the test of the sufficiency of a judgment rests in its substance rather than its form"], quoting *Hentig v. Johnson* (1908) 8 Cal.App. 221, 225.)

Here, Berger Khan filed three separate motions to compel the Stueves to provide further discovery. Each motion included a request for a monetary sanction to cover the costs of preparing that particular motion. The Stueves opposed the motions to compel. The discovery referee conducted a hearing and signed a proposed written order. Under a separate heading, the referee analyzed the first motion to compel, granted it, and awarded the requested sanction of $2,835. Under a second heading, the referee then analyzed the second motion to compel, granted it, and awarded the requested sanction of $1,800. Finally, under a third heading, the referee analyzed the third motion to compel, granted it, and awarded the requested sanction of $2,700. Each sanction amount was imposed against the Stueves and their attorney jointly and severally. The trial court later signed a written order, which was identical to the referee's proposed order.

The Stueves' characterization of the trial court's order as one sanction award is simply not supported by the record. The combined total of the three sanction amounts ($7,335) was never stated in either the referee's recommendation or the court's final order. Further, it is apparent that the three monetary sanctions were adjudicated separately. To adopt the Stueves' characterization of the three sanction awards as a combined amount simply because they were each included in a single written order would place form over substance.

The Stueves cite *Rail-Transport Employees Assn. v. Union Pacific Motor Freight* (1996) 46 Cal.App.4th 469 (*Rail-Transport*) in support of their position, but that case is inapposite. In *Rail-Transport*, an employee association and its attorney appealed from a $29,161 discovery sanction. (*Id*. at p. 471.) Part of the sanction was apportioned against the plaintiffs as follows: $5,800 solely against the attorney, $2,270 solely against

the association, and $21,091 jointly and severally against both the attorney and the association. (*Ibid*.) The court held that the $29,161 sanction order was appealable. (*Ibid*.)

Unlike *Rail-Transport*, the trial court in this case imposed three separate discovery sanctions that were each less than $5,000; each sanction was apportioned against the Stueves and their attorney jointly and severally. This is not at all like *Rail-Transport* where there was only one discovery sanction. The fact that the $29,161 sanction was apportioned against the plaintiff and their attorney in varying amounts and one of those amounts happened to be less than $5,000 was never discussed or considered. (*Costa Mesa City Employees Assn. v. City of Costa Mesa* (2012) 209 Cal.App.4th 298, 307 ["Cases are not authority for issues they did not consider"].)

In sum, the trial court imposed three separate monetary sanctions. None of the sanctions exceeded the $5,000 appealability threshold.

B. Monetary Sanctions Cannot be Aggregated

Alternatively, the Stueves contend that the three sanctions can be aggregated to meet the $5,000 appealability threshold. (§ 904.1, subd. (a)(11).) The Stueves cite dicta from *Champion/L.B.S. Associates Development Co. v. E–Z Serve Petroleum Marketing, Inc.* (1993) 15 Cal.App.4th 56 (*Champion/L.B.S.*), in support of their argument. But the dicta in *Champion/L.B.S.* was considered and squarely rejected in *Calhoun v. Vallejo City Unified School Dist.* (1993) 20 Cal.App.4th 39, 45 (*Calhoun*). We agree with *Calhoun*.

In *Champion/L.B.S., supra,* 15 Cal.App.4th at page 58, a development company sued several oil companies for contamination of plaintiff's property. During discovery proceedings, the trial court ordered two monetary sanctions. (*Id*. at p. 59.) One sanction was for $1,500 against one of the defendants and its attorney. The other sanction was for $315 solely against the attorney. (*Ibid*.) The defendant filed an

interlocutory appeal, but this court dismissed that portion of the appeal that dealt with the $315 sanction. (*Id.* at pp. 59-60.) At that time, former section 904.1, subdivision (k), as amended (Stats. 1989, ch. 1416, § 25), only allowed for an interlocutory appeal from a monetary sanction if the amount exceeded $750. The court held: "The $315 sanction award is below the $750 'bright line' created by subdivision (k). It is not appealable." (*Champion/L.B.S., supra*, 15 Cal.App.4th at p. 59.)

While the *Champion/L.B.S.* holding would seem to have settled the issue, the majority opinion continued: "Having said this, we recognize that there may be situations where 'aggregating' separate sanction awards in order to reach the $750 minimum may be appropriate. Let us assume that a defendant simultaneously propounds a set of interrogatories, a set of requests for admission, and a request for production of documents to a plaintiff, and defendant believes plaintiff's responses are inadequate. Defendant files a motion (or perhaps two or three motions) to compel further discovery. Plaintiff then opposes the motion (or motions), asserting the responses are complete. The trial court sides with defendant and issues three separate sanction awards of $600 each. In such a case, it could well be that it is the same conduct which is being sanctioned three times. If so, we think 'aggregation' would be proper. Absent such circumstances (which are certainly not present in the instant appeal), the $750 bright line test applies." (*Champion/L.B.S., supra,* 15 Cal.App.4th at pp. 59-60.) Justice Crosby concurred and dissented: "Dismissal of that portion of the appeal purporting to challenge the $315 sanctions award is, of course, correct. [Citation.] I vehemently disagree, however, with the majority's dictum concerning aggregation of a series of minuscule discovery sanctions awards to reach what they characterize as a '$750 bright line.'" (*Id*. at p. 60 (conc. & dis. opn. of Crosby J.).)

The *Calhoun* opinion disagreed with the dictum in *Champion/L.B.S.* (*Calhoun, supra,* 20 Cal.App.4th 39.) In *Calhoun,* a school employee filed a wrongful

termination claim against a school district and an employees' union. (*Id*. at p. 41.) The trial court ordered the plaintiff to pay two separate discovery sanctions, but neither sanction exceeded the $750 statutory threshold. (*Ibid.*) The plaintiff argued that the two sums should be aggregated to meet the appealability threshold; *Calhoun* rejected this argument. (*Id.* at pp. 43–45.) The court reasoned that "the purpose of [the appealability threshold] was to *restrict* the number of appeals from sanctions orders. [Citations.] [¶] Aggregation of multiple sub-$750 sanction orders to create appealability would derogate this restriction on the right of appeal." (*Id.* at p. 44.)

Calhoun also concluded that "the standards for aggregation suggested by the majority in *Champion/L.B.S.* . . . are, in our view, too vague and unwieldy to be of practical value. The majority in *Champion/L.B.S.* would ask whether the 'same conduct' is being subjected to multiple sanctions. [Citation.] However, the very example given in that case—multiple sanctions after opposition to a motion to compel further discovery upon three discovery requests—illustrates the difficulty involved in applying such a standard: is there a single course of misconduct in opposing the motion to compel, or are there multiple instances of misconduct in failing to satisfy the three discovery requests?" (*Calhoun, supra,* 20 Cal.App.4th at p. 44.)

Calhoun held that "[s]uch standards for aggregation would inject an unwelcome dose of uncertainty into the appellate process. The Legislature intended to create a $750 'bright line' threshold for appealability of monetary sanction orders. [Citation.] A rule permitting aggregation of 'same conduct' or 'nonseparate' sanctions would blur that bright line. In close cases, such as the present one, the sanctioned party would be unsure whether to proceed by appeal or by writ petition. The wrong decision could prove to be procedurally fatal. Bright lines are often too arbitrary to be of much use in the substantive law, but they are usually quite serviceable and even preferred as procedural rules, which should serve as clearly marked guideposts rather than traps for

the unwary. [¶] We conclude that because of the Legislature's intent to reduce the number of appeals from monetary sanction orders and the confusion that would result from a rule permitting aggregation, multiple sub-$750 sanctions may not be aggregated under *any* circumstances to meet the appealability threshold . . . . We endorse a bright line rule that a sanction order is nonappealable if it does not impose any sanction exceeding $750, and thus an order requiring payment of multiple sanctions, none of which exceed $750, is nonappealable even if the total aggregated sanctions exceed $750." (*Calhoun, supra*, 20 Cal.App.4th at p. 45, italics added.)

We agree with the reasoning of *Calhoun* and similarly reject the dictum in *Champion/L.B.S.* If appellate courts allowed parties to aggregate multiple pretrial sanctions amounts in order to file an appeal it would: 1) run counter to the Legislature's intent to limit the number of interlocutory appeals from sanctions orders; 2) create uncertainty as to when sanction awards could be appealed; and 3) violate the "bright line" rule of appealability created by the Legislature.

Further, we note that section 904.1 has been amended several times since *Champion/L.B.S.* and *Calhoun* were published, and the amendments have not rejected *Calhoun's* "bright line" rule or adopted *Champion/L.B.S.'* suggestion of allowing aggregation of separate sanction orders in certain situations. "Where a statute has been construed by judicial decision, and that construction is not altered by subsequent legislation, it must be presumed that the Legislature is aware of the judicial construction and approves of it." (*People v. Hallner* (1954) 43 Cal.2d 715, 719.) Moreover, the Legislature has increased the appealability threshold from $750 to $5,000, which further indicates its intent to limit the number of interlocutory appeals.

Accordingly, we conclude that the Stueves' three separate monetary sanctions cannot be aggregated to reach the appealability threshold. The Stueves can, of course, appeal from the discovery sanctions as part of an appeal after the final judgment.

C. There Are No Extraordinary Circumstances That Warrant Writ Relief

"Sanction orders or judgments of five thousand dollars ($5,000) or less against a party or an attorney for a party may be reviewed on an appeal by that party after entry of final judgment in the main action, or, at the discretion of the court of appeal, may be reviewed upon petition for an extraordinary writ." (§ 904.1, subd. (b).) A defective appeal may be treated as a petition for writ relief, but a court of appeal should exercise such discretion only in extraordinary circumstances. (*City of Gardena v. Rikuo Corp.* (2011) 192 Cal.App.4th 595, 599.)

Generally, an appeal lies only from a final judgment, which terminates the trial court proceedings by completely disposing of the matter in controversy. (*Griset v. Fair Political Practices Com.* (2001) 25 Cal.4th 688, 697.) "'The theory is that piecemeal disposition and multiple appeals in a single action would be oppressive and costly, and that a review of intermediate rulings should await the final disposition of the case.'" (*Conlan v. Shewry* (2005) 131 Cal.App.4th, 1354, 1365, quoting 9 Witkin, Cal. Procedure (4th ed. 1997) Appeal, § 58, p. 113.)

Here, the Stueves argue there is "more than enough time" before final judgment to address the three discovery sanctions by way of writ proceeding. While that may be a true statement, it is simply not an extraordinary circumstance. More importantly, the Stueves have not justified a departure from the Legislature's intent—and our general preference—that ancillary pretrial issues (such as discovery sanctions) should ordinarily be reviewed only after a final judgment.

III

DISPOSITION

The appeal is dismissed without prejudice. Berger Khan shall recover its costs on appeal.

MOORE, ACTING P. J.

WE CONCUR:

IKOLA, J.

THOMPSON, J.